

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PASCUAL SAUCILLO,

Defendant.

No. CR03-4018-MWB

**REPORT AND RECOMMENDATION
ON MOTION TO SUPPRESS**

I. INTRODUCTION

This matter is before the court on the motion to suppress filed by the defendant Pascual Saucillo (“Pascual”) on April 24, 2003, together with a supporting brief (Doc. Nos. 17 & 18). The plaintiff (the “Government”) filed a brief resisting the motion on May 5, 2003 (Doc. No. 21). Pursuant to the trial scheduling order entered March 21, 2003 (Doc. No. 11), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge for the filing of a report and recommended disposition.

The court held a hearing on the motion on May 5, 2003, at which Assistant U.S. Attorney Jamie Bowers appeared on behalf of the Government, and Pascual appeared in person with his attorney, John P. Greer. The Government offered the testimony of law enforcement officers Scott Brasselero, Salvador Sanchez, and Mike Simons. The following exhibits were admitted into evidence: Gov’t Ex. 1, a videotape showing the apartment building and environs where the events leading to Pascual’s arrest took place; Gov’t Exs. 2 through 9, photographs of the apartment building; and Def. Exs. A through D, photographs of the apartment building.

The court has reviewed the parties' briefs and their attachments, and carefully considered the evidence, and now considers the motion ready for decision.

II. FACTUAL BACKGROUND

Sometime in the afternoon of January 29, 2003, Sioux City Police officers received information from a Tri-State Drug Task Force agent that Pascual was dealing drugs out of an apartment located at 1620 Jackson Street in Sioux City, Iowa. The information was relayed to Officers Brasselero and Simons sometime between 8:00 p.m. and 12:00 a.m. The officers decided to do a "knock and talk" at the apartment, for purposes of talking with Pascual about the allegations. Because of other pending police calls, the officers were not able to go to the apartment for several hours.

The building at 1620 Jackson Street is a converted single-family dwelling, now being used as a duplex, with one apartment downstairs and one apartment upstairs. There is a central entry door in the front that leads into a hallway. An entry door into the downstairs apartment opens off the hallway to the right of the central doorway, and a staircase to the left of the central doorway leads from the downstairs hallway to an upstairs hallway. An entry door into the upstairs apartment opens off the upstairs hallway.

The officers arrived at the building at 2:49 a.m. on January 30, 2003. The outside front entrance to the building was locked. They knocked on the door, but got no response. After waiting two or three minutes, they walked around to the back of the building and knocked on the back door. Again receiving no response, they returned to the front door and knocked again. While they were waiting to see if someone would come to the door, Officer Simons saw a video security camera in the northwest upper window of the building. A short time later, he saw curtains move in the southwest upper window. Officer Brasselero

testified the surveillance camera raised some suspicion in the officers' minds because in their experience, surveillance cameras often are an indicator of criminal activity.¹

The officers knocked several more times on the front door. While they were waiting for a response, they heard a loud "thud" come from the rear of the building. Officer Simons walked quickly toward the back of the building to see if someone was trying to leave the building through the back door. He did not see anyone leaving the building. In the meantime, an individual came to the front door.² Officer Brasselero asked if the individual was Pascual, and the individual said, "No," and identified himself as Ismael Sanchez-Alba ("Ismael"). The officer asked if Pascual was in the building, and Ismael said he was. The officer asked if he could speak to Pascual, and Ismael directed him to the stairs inside the building. Officer Brasselero contacted Officer Simons on the radio, and stated he had gained entry into the building.

Officer Brasselero went up the stairs, and stood at the doorway to the upstairs apartment while Ismael went inside and called for Pascual. A man came out of one of the bedrooms, and identified himself as Pascual. The officer testified Pascual spoke with a heavy Hispanic accent. Officer Brasselero asked Pascual, "Where do you live?" and Pascual responded, "Here." The officer asked, "Do you speak English?" and Pascual responded, "A little bit." He asked, "Are there any narcotics in the residence?" Pascual did not respond. At that point, Officer Brasselero decided to have a Spanish-speaking

¹The officer testified he has "very, very rarely" seen surveillance cameras in dwellings where no criminal activity is taking place.

²Officer Brasselero testified it was between five and ten minutes from the time the officers first arrived at the building until the individual came to the door.

officer come to the scene to interpret, and he called Officer Sanchez and asked him to come to the scene.³

Officer Simons reached the upstairs apartment after Officer Brasselero was already inside. Officer Simons testified that Ismael, who “spoke relatively good English,” told him he could come into the apartment. The officer testified he smelled an odor he believed to be methamphetamine immediately upon entering the apartment. He asked Ismael if anyone else was in the residence. Ismael said there was, and another individual came out of one of the bedrooms. Officer Simons asked Ismael for permission to verify that no one else was in the apartment. Ismael agreed, and Officer Simons did a cursory walk-through to make sure no one else was present in the apartment.

Officer Sanchez arrived at the building about five minutes after Officer Brasselero called him. Officer Sanchez is fluent in Spanish, and he interprets for non-Spanish-speaking officers when needed. He conversed with Pascual in Spanish, and he testified Pascual spoke good Spanish and had no trouble conversing with him. Their conversation took place in Pascual’s bedroom, with Officer Sanchez sitting on the bed and Pascual sitting in a chair facing him. Officer Sanchez told Pascual the officers were there to investigate reports of drug sales from the apartment. The officer stated that in response to this information, Pascual began to act nervous, and his fingers were twitching. Officer Sanchez asked who lived in the apartment, and Pascual stated he lived in there along with the “two other guys in the hall.” He stated he was asleep when the officers first arrived.

Officer Sanchez asked if there were any drugs in the apartment, and Pascual did not answer. Officer Sanchez rephrased his question, and asked if drugs were in the apartment,

³Officer Brasselero testified that although he does not speak Spanish, he knows a few phrases and can ask simple questions in Spanish. He did not recall whether he asked Pascual the preliminarily questions in English or Spanish, but he demonstrated on the record how he would have asked the questions in Spanish.

where would they be? Pascual said if drugs were there, they would be in the green jacket in his closet. Officer Sanchez testified he asked, "Can we search your room?" and Pascual responded, "Yes, that's fine," which he repeated more than once.⁴ Officer Sanchez asked Pascual if they could bring a drug dog into the apartment. He testified Pascual gave nonverbal consent by nodding his head up and down. Officer Sanchez told the other officers Pascual had consented to the search and the drug dog.

Officer Sanchez remained with Pascual while Officers Brasselero and Simons searched the bedroom. The officers noticed a monitor for the security camera. They checked two green jackets in the closet, but no drugs were found in either jacket. They located some drug notes, 14 boxes of pseudoephedrine, and a small safe, which they opened with a key provided by Pascual. The safe was completely empty. They found no narcotics in the bedroom; however, throughout the search, both officers were aware of a strong odor they believed to be methamphetamine. The odor was strongest right in the doorway to the bedroom.

Officer Brasselero then went to his patrol car and got his drug dog. The dog initially indicated on a suitcase in the closet, directly behind the main door of the bedroom. Officer Brasselero looked in the suitcase and found more than 20 pair of new jeans, still bearing labels and price tags. The dog next indicated on a lower drawer of a dresser in the southwest portion of the bedroom. Nothing was found in the drawer. A window was located right behind the dresser. The window was slightly open, which the officers found odd because it was very cold outside. The screen in the window was pushed out and broken. The dog tried to stick its head out of the window, but Officer Brasselero would not let the dog do so, and he continued searching the bedroom, and also searched the kitchen area. While Officer Brasselero was searching the kitchen, Officer Simons looked out the bedroom

⁴Officer Sanchez testified Pascual repeated, "Esta bien," which means "That's fine" in Spanish, more than once.

window with the pushed-out screen. He observed several packages laying directly below the window in the snow. Officer Simons advised the other officers to take Pascual and his roommates into custody. When he searched the area underneath the window, Officer Simons found a scale, and packages containing large amounts of methamphetamine and marijuana. Officer Brasselero testified the ground was covered with snow, and none of the items they found had any snow on top of them. The area where the items were found is in the rear of the residence, right next to some parking spaces.⁵

Pascual and his roommates were transported to the police station. Officer Sanchez continued to translate during Pascual's interview. Officer Sanchez and a Drug Task Force officer read Pascual his *Miranda* rights, which were read in Spanish by Officer Sanchez and in English by the other officer. The officers asked Pascual about the drugs that were found outside the apartment building, and Pascual made numerous incriminating statements.

III. ANALYSIS

Pascual seeks to suppress the evidence found outside the apartment building, and his subsequent statements at the police station, on several grounds. He argues (1) the apartment's occupants did not give knowing, intelligent and voluntary consent to the officers to enter and search an apartment; (2) assuming *arguendo* that Ismael gave valid consent for the officers to enter the apartment, he lacked authority to give them consent to search the apartment; (3) even if consent to search was given, it was limited to Pascual's green jacket, and the officers exceeded the scope of the consent; and (4) the officers did not have the right to search the curtilage of the apartment building without the residents' consent, which was not given.

⁵For additional details of the search, see the officers' offense reports, attached to Pascual's brief, Doc. No. 18, and incorporated in his brief by reference.

Little discussion is necessary to dispose of Pascual's arguments. The uncontroverted evidence indicates Ismael voluntarily consented to the officers' entry into the building and the upstairs apartment. Ismael indicated he resided at the apartment, and was not a mere guest. He spoke and understood English, responded appropriately to questions, and called for Pascual to come out to talk with the officers.

The uncontroverted evidence also indicates Pascual voluntarily consented to the officers' search of the apartment. Pascual argues he only consented to a search of the green jacket, not to the whole apartment, and he takes issue with the officers' statements in their reports that it only "appeared" he consented "by moving his head up and down." (Doc. No. 18, p. 5) However, Pascual's nonverbal consent was only to the drug dog; he consented verbally to a search of the apartment, and when the dog was brought into the apartment, he never expressed any objection to the use of the dog to assist in the search.

The test for determining whether an officer has exceeded the scope of a suspect's consent to enter the suspect's premises "is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect." *United States v. Phelps*, 168 F.3d 1048, 1057 (8th Cir. 1999) ((citing *United States v. Sanchez*, 32 F.3d 1330, 1334 (8th Cir.1994); quoting *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991), *cert. denied*, 513 U.S. 1158, 115 S. Ct. 1119, 130 L. Ed. 2d 1082 (1995)); see also *United States v. Stapleton*, 10 F.3d 582, 584 (8th Cir. 1993) (silence during search may imply consent)). The court finds it was reasonable for Officer Sanchez to conclude, and therefore to communicate to the other officers, that Pascual had consented to a search of the apartment, not just the green jacket.

The court finds valid, knowing and intelligent consent was given to the search of the apartment, and to the use of the drug dog. The only remaining issue is whether the officers had the right to search the curtilage of the apartment building without further consent.

Pascual apparently extends the scope of his argument to include whether the officers had the right to look out of the window.

Setting aside for a moment the question of whether Pascual had any expectation of privacy in the curtilage of the apartment building, the court finds that in any event, the officers had probable cause to look out of the window, given the circumstances. The window was open in very cold weather. It was located right next to a dresser where the drug dog had indicated. The screen was pushed out of the window, and the officers had heard a loud “thud” coming from the rear of the building. Once Officer Simons saw the items lying on the ground in plain view, the officers had the right to investigate further to see what he had observed. *See United States v. Reinholz*, 245 F.3d 765, 777 (8th Cir. 2001) (officers may seize item in plain view “if the police are lawfully in a position to observe the item and its incriminating character is immediately apparent”) ((citing *Horton v. California*, 496 U.S. 128, 136-38, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990))).

If the seized items had not been in plain view, the issue would have been whether the apartment’s residents had an expectation of privacy in the curtilage of the building. The courts are split on this issue. *See United States v. King*, 227 F.3d 732, 743-50 (6th Cir. 2000) (digesting cases, including, *inter alia*, *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974), in which the court held a tenant of a four-unit apartment building had a reasonable expectation of privacy in the backyard of the building, which was “completely removed from the street and surrounded by a chain link fence.”) However, the court has found no case, and none has been cited by Pascual, in which a court has held a tenant of a multi-family dwelling had an expectation of privacy in a common area that was completely open to the public, as was the case here. The area surrounding Pascual’s residence was not fenced or otherwise secluded from public access. Indeed, the area where the drugs were found on the ground was adjacent to a parking area in back of the building.

Moreover, the Eighth Circuit Court of Appeals has “repeatedly held that tenants of multifamily dwellings have no legitimate expectation of privacy in common or shared areas.” *United States v. Mendoza*, 281 F.3d 712, 715 (8th Cir. 2002) (citing *United States v. McCaster*, 193 F.3d 930 (8th Cir. 1999) (no expectation of privacy in duplex hallway’s closet); *United States v. McGrane*, 746 F.2d 632 (8th Cir. 1999) (no expectation of privacy in basement storage locker accessible by other residents of multi-family dwelling); *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977) (no expectation of privacy in conversation that took place in apartment building hallway)). A similar conclusion is warranted here. Pascual had no right to exclude others from the curtilage of the building and took no precautions to maintain his privacy in the items he threw out the window. Pascual has failed to meet his burden to show “both a subjective expectation of privacy and that the expectation is objectively reasonable; that is, one that society is willing to accept.” *Mendoza*, 281 F.3d at 715 (internal quotations, citations omitted).

IV. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections⁶ to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Pascual’s motion to suppress (Doc. No. 17) be **denied**.

IT IS SO ORDERED.

DATED this 13th day of May, 2003.

⁶Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

PAUL A. ZOSS
U.S. MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT